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No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI
and
ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, Director of Revenue
and
DELONGS, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Missouri

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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INTRODUCTION

Both sets of respondents acknowledge that the Questions Presented by our petition are indeed squarely posed by this case. Both sets of respondents also defend the Missouri Supreme

Court's analysis of this case and its reliance on *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1925), to justify and legitimize the substantial discrimination against interstate commerce inherent in the Missouri use tax.

Both sets of respondents, however, seek to avoid review of the constitutional issue in this case by suggesting procedural and jurisdictional impediments to the Court's consideration of the merits. This reply is filed for the limited purpose of refuting respondents' spurious suggestions that this case is not properly here.

I. THE FILING OF A MOTION FOR REHEARING BEFORE THE MISSOURI SUPREME COURT IS NOT A CONDITION PRECEDENT TO A "FINAL" JUDGMENT UNDER 28 U.S.C. § 1257(a).

Respondents argue that petitioners did not exhaust the judicial resources of the State of Missouri because they did not file a motion for rehearing, as permitted (but not required) by Rule 84.17 of the Missouri Rules of Civil Procedure. This case was heard by the state Supreme Court en banc, and it is well settled that a petitioner in this Court is not first required to request rehearing when the highest court of the state has ruled. In STERN, GRESSMAN & SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986), p. 138, the authors confirm the seemingly self-evident proposition that ". . . where no petition for rehearing is in fact filed, the mere existence of state procedure permitting such a filing does not affect the finality of the judgment and does not prevent the Supreme Court from asserting immediate jurisdiction over the case. *Southern R. Co. v. Clift*, 260 U.S. 316 (1922); *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551-52 (1945)."

Respondents' "exhaustion" argument is frivolous.[1]

II. PETITIONERS HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF § 144.748, R.S.Mo. (Supp. 1991).

The parties stipulated that the state trial court had jurisdiction to hear this case (Stip. ¶1). The state respondents did not question petitioners' standing either in the trial court or in the state Supreme Court. The intervenor-respondents raised standing as an issue, but the Missouri Supreme Court summarily rejected that argument (Pet. Apdx. A-2-3).

In an effort to avoid review in this Court, both sets of respondents have now questioned petitioners' standing (although the state respondents have done so almost entirely by incorporating the intervenors' arguments), and both have distorted the record and misapprehended the law.

The stipulation of the parties establishes the following facts relating to standing:

1. Although all the members of Petitioner Associated Industries of Missouri ("AIM") do business in Missouri, some of them "are multi-state corporations whose principal operations and headquarters are located outside Missouri" (Stip. ¶2). The members pay sales *and use taxes*, when applicable, on purchases of tangible personal property made within and without Missouri (Stip. ¶4). AIM itself, of course, has standing to bring suit on

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[1] In *Osment v. Pitcarin*, 317 U.S. 587 (1942), the petitioner was seeking review of a decision of *a division* of the Missouri Supreme Court, and he had not petitioned for rehearing by the court en banc before coming here. This Court held that the petitioner had not exhausted the appellate review provided by state law, and jurisdiction in this Court was lacking. The Missouri Supreme Court no longer sits in divisions; as noted, this case was heard originally by the court en banc.

behalf of its members who would otherwise have standing to sue in their own right. *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333, 341-45 (1977); *Warth v. Seldin,* 422 U.S. 490, 511 (1975).

2. Several members of AIM also collect and remit Missouri use taxes on sales of personal property made by them outside of Missouri to purchasers located within Missouri (Stip. ¶4). When those companies sell goods into Missouri, they are required to collect the 1.5% additional use tax that is challenged in this case.[2]

3. Petitioner Alumax buys property from sellers within and without Missouri and pays sales and use taxes, respectively, on such purchases. Alumax pays approximately $3,000 in Missouri use taxes each month, more than one-quarter of which is attributable to the offending 1.5% additional tax imposed by §144.748 (Stip. ¶5).

4. Alumax purchases products from a vendor located in St. Francois County, Missouri, which are subject to a sales tax of 4.975% — less than the use tax applicable statewide (Stip. ¶5).

Respondents apparently assume that only an out-of-state merchant who sells goods into a Missouri county where the use tax is higher than the sales tax would have standing to complain of unconstitutional discrimination. Even if that were correct, petitioners would plainly qualify because, as noted above, they are required to collect use taxes on sales of personal property made by them outside of Missouri to purchasers inside Missouri — including those parts of Missouri where the use tax exceeds the sales tax.

But the universe of injured parties is not so narrowly circumscribed. The 1.5% additional use tax is imposed by state statute (§ 144.748) and is applicable in every city and county to every interstate sales transaction. So anyone who is required to collect use taxes — as well as anyone who is required to pay them — is injured because the discriminatory feature of the additional use tax renders it invalid on its face in all its applications. Stated otherwise, the unconstitutional aspect of the tax prevents its collection anywhere in Missouri. Therefore, anyone who has paid a use tax under the present statutory scheme — a group that plainly includes petitioners — has necessarily paid the offending 1.5% component thereof and has standing to assert its unconstitutionality.

[2] Hence, respondent Lohman's conclusion in footnote 4 (Br. 7) is simply wrong. Some petitioners are in fact identically situated to the Illinois mail-order house hypothesized at page 10 of our petition.

* * * * *

Accordingly, the procedural roadblocks created by respondents are illusory and do not prevent the Court's consideration of the substantial constitutional issues presented by this case.

Respectfully submitted,

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